J.M. WOTHERSPOON & CO. LTD. v. HENRY AGENCY HOUSE

[O.C.J. (Suffian J.) — December 20, 1961]

[K.L. — Civil Suit No. 476 of 1960]

Agency — Agent del credere — Application of English law under Civil Law Ordinance, 1956, s.5(1) — Requirement of consideration — Agreement without consideration — Whether contract under Contracts (Malay States) Ordinance — Meaning of "voluntary" in Contracts (Malay States) Ordinance, 1950, s.26(b).

The questions raised in this action were whether the defendant firm in Kuala Lumpur was an agent *del credere* of the plaintiff company in London, and if not, whether the agreement entered into by them without consideration was a contract under Contracts (Malay States) Ordinance.

Held: (1) as the Contracts (Malay States) Ordinance is silent on the subject of *del credere* agency, by virtue of section 5(1) of the Civil Law Ordinance, 1956 the law applicable in England is applicable in the Federation;

(2) to prove a *del credere* agency it is necessary to show not only that a commission was paid to the person alleged to be the *del credere* agent by the party claiming to be principal, but it must also be shown that an additional commission — *del credere* commission — was paid. As no payment of any commission was proved, the defendant was not liable as a *del credere* agent;

(3) an agreement made without consideration becomes a binding contract if in the words of section 26(b) of the Contracts (Malay States) Ordinance, No. 14 of 1950 "it is a promise to compensate wholly or in part a person who has already voluntarily done something for the promisor." An act done at the suggestion of another party is not done voluntarily and as the plaintiff in this case had acted on the suggestion of the defendant it followed that the plaintiff's act was not voluntary and therefore there was no binding contract under section 26(b) of the Contracts (Malay States) Ordinance.

Cases referred to:—

(1) *Thomas Gabriel & Sons* v. *Churchill & Sim* [1914] 3 K.B. 1272.
(2) *Thomas Gabriel & Sons* v. *Churchill & Sim* [1914] 1 K.B. 449.
(3) *Couturier* v. *Hastie*, 8 Ex. 40.
(4) *Kalipada Das & Anor.* v. *Durgadas Roy*, A.I.R. 1923 Calcutta 677.
(5) *T.V. Krishna Iyer* v. *The Official Liquidator, The Cape Comorin General Traffic Co. Ltd.*, A.I.R. 1952 Travancore-Cochin 49.
(6) *Raja of Venatagiri* v. *Krishnayya*, A.I.R. 1948 Privy Council 150.

SUIT.

A. L. Hills for the plaintiff.

Proprietor of defendant firm in person.

Cur. Adv. Vult.

Suffian J.: The questions for decision in this case are whether the defendant firm in Kuala Lumpur was an agent *del credere* of the plaintiff company in London, hereinafter referred to as the plaintiff, at the material times and if so whether the defendant firm was liable to reimburse the plaintiff who suffered loss as a result of the insolvency of the two Malayan companies with whom the plaintiff dealt and which later became bankrupt.

As the Contracts (Malay States) Ordinance No. 14 of 1950 is silent on this subject, by virtue of section 5(1) of the Civil Law Ordinance No. 5 of 1956 the law applicable in England is applicable in the Federation.

There is abundant authority in England, particularly the Court of Appeal decision in *Thomas Gabriel & Sons* v. *Churchill & Sim*,[1] for the proposition that where there is an ascertained amount or certain sum due as a debt from the buyer to the seller, and the buyer fails to pay that amount either through insolvency or something that makes it as impossible to recover as in the case of insolvency, the *del credere* agent has to answer for that default. So here I concern myself solely with the question whether or not the defendant firm in this case was a *del credere* agent of the plaintiff at the material times.

I find some of the facts proved or admitted as follows:

(a) As to the first transaction, on the 21st December, 1957, the defendant firm in Kuala Lumpur ordered through the plaintiff, a confirming house in London, certain confectionery which the plaintiff obtained from a Dutch firm in Holland. The confectionary was duly shipped and delivered by the plaintiff under Invoice No. Z7157/M30088 on 21st February, 1958, at the contract price of £278. 8s. 6d. The plaintiff paid the Dutch firm the said contract price and the goods were delivered to Lam Ann Thye & Co., 32, Cecil Street, Kuala Lumpur. That company became bankrupt and paid a final composition of 35% to the plaintiff, of which the plaintiff admits receipt. The plaintiff claims that the defendant firm as its *del credere* agent is liable to reimburse it to the extent of the contract price less the 35% composition received from the bankrupt company.

(b) As to the second transaction, on 20th December, 1957, the defendant firm ordered through the plaintiff 10 tons of steel bars. The goods were duly shipped and delivered by the plaintiff under Invoice No. 27138/M30129 at the contract price of $3,613. The goods were subsequently delivered to Sin Lian Hin & Co., 209, Sungei Besi Road, Kuala Lumpur. That company also became bankrupt and has paid nothing to the plaintiff. The plaintiff claims that the defendant firm as its *del credere* agent is liable to reimburse the price of the steel bars to the plaintiff.

The defence is a complete denial. Mr. Cheong, the proprietor of the defendant firm at the material times, appearing in person, denied that his firm was ever employed by the plaintiff as its *del credere* agent. In evidence he said that it was only an unofficial agent of the plaintiff appointed without any formal document or agreement. He said that his firm found for the plaintiff in London prospective buyers in Malaya. The plaintiff would check on the credit of these buyers and, if satisfied after enquiries made by its own agents, would confirm any order forwarded by the defendant firm and the goods would then be supplied direct to the Malayan buyers. In support of this Mr. Cheong produced a copy of a letter, exhibit D.1 dated 24th December, 1957, which he wrote to the plaintiff. For this service he said that the defendant firm received no commission from the plaintiff, the only commission it received being from the firms which supplied goods for the plaintiff to the buyers in Malaya. As to these particular transactions, he said that the plaintiff charged the buyers 3½% buying commission, but he denied that out of this commission any commission was ever paid to him by the plaintiff, and I find that

the plaintiff, on whom the onus of proof lies, has not proved that it paid the defendant firm any commission at all.

Mr. Hills for the plaintiff admits that there was no formal appointment of the defendant firm by the plaintiff as its *del credere* agent, but contends that from the correspondence in Exhibit A such an agency may be inferred.

While for the creation of an ordinary agency, no consideration need be proved, section 138 of the Contracts (Malay States) Ordinance No. 14 of 1950, is no consideration required for the creation of a *del credere* agency?

Halsbury's Laws of England, 3rd Edition, Volume 1, states at page 152:

"A *del credere* agent is one who, *usually* for extra remuneration, undertakes to indemnify his employer against loss arising from the failure of persons with whom he contracts to carry out their contracts."

It is not stated that the payment of extra remuneration is a necessary ingredient of this type of agency.

However, *Bowstead* on Agency, 12th Edition, at page 3 states:

"A *del credere* agent is a mercantile agent who, *in consideration of extra remuneration*, called a *del credere* commission, guarantees to his principal that third persons with whom he enters into contracts on behalf of the principal shall duly pay any sums becoming due under those contracts."

The edition of *Story* on Agency quoted by Pickford J. at pages 455 and 456 in *Thomas Gabriel & Sons v. Churchill & Sim,*[2] had this comment:

"The most important" — that is, the most important of the duties and obligations of a *del credere* agent — "in a practical view, to be here taken notice of, is, the contract of guarantee by a factor, arising from the receipt of what is commonly called a *del credere* commission . . . . ., by which he, in effect, becomes liable, in the case of a sale of goods, to pay to his principal the amount of the purchase money, if the buyer fails to pay it, when it becomes due."

"A factor, with a *del credere* commission, is liable to the principal, if the buyer fails to pay, or is incapable of paying."

In an American case *Wolff* v. *Koppel,* a note on which appears in 8 Ex. 56, Cowen J. stated:

"The implied promise of the factor is merely that he will sell to persons in good credit at the time; and in order to charge him, negligence must be shewn" — that is, a factor without a *del credere* commission. "He takes an additional commission, however, and adds to his obligation that he will make no sales unless to persons absolutely solvent; in legal effect, that he will be liable for the loss which his conduct will bring upon the plaintiff, without the onus of proving negligence. The merchant holds the goods, and will not part with them to the factor without this extraordinary stipulation; and a commission is paid to him for entering into it . . . . . Instead of paying cash, the factor prefers to contract a debt or duty which obliges him to see the money paid. This debt or duty is his own and arises from an adequate consideration."

This view was noted with approval by Parke B. in *Couturier* v. *Hastie*[3] at page 56. In delivering the judgment of the Court of Exchequer, he said:

"A higher reward is paid in consideration of their" — that is, the *del credere* agents — "taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency . . . . . of their contracts by their vendees."

In view of the words underlined in the above extracts, it is quite clear that to constitute a *del credere* agency not only is it necessary for a commission to have been paid by the plaintiff to the defendant, but an additional commission should also have been paid.

As in my view no commission at all, let alone a *del credere* commission, was proved to have been paid here by the plaintiff to the defendant, the plaintiff has not proved that the defendant was its *del credere* agent at the material times and therefore liable to pay the plaintiff in respect of the goods supplied by or through them to the two Malayan companies which eventually became insolvent.

As regards the first transaction, the sale of the confectionery to Lam Ann Thye & Co., if the defendant firm is not liable to the plaintiff because the plaintiff has not proved payment of any commission, let alone a *del credere* commission, to the defendant, may the defendant firm be held liable, as is urged by Mr. Hills, on the letter dated 13th September, 1958, written by it to the plaintiff, page 4 of the Agreed Bundle of Correspondence, Exhibit A? In this letter the defendant firm referred to a consignment of part of the confectionery worth £185 by the suppliers in Holland to Messrs. Lam Ann Thye & Co. in Kuala Lumpur. It is apparent from this letter that there was some difficulty about payment of this amount by Lam Ann Thye & Co. In paragraph 5 of that letter the defendant firm referred to itself as "your agent" — meaning the plaintiff's agent. The following also occurred in that letter:

"[The defendant firm] do not hesitate to pay you [the plaintiff] in full value of your invoice" (para. 2).

"In this instance you should bear in mind that neither ourselves [meaning the defendant firm] nor the dealer will ignore responsibility for this £185 which you can be rest assured" (para. 4).

"On our part, as your agent, obviously, we not only see that you receive justice, but we are always in a position to admit liability . . . . ." (para. 5).

"In the event of any default by them [the buyers in Kuala Lumpur] we [defendant firm] are quite prepared to pay out from our own pocket," (para. 7).

I am of the view that these are clearly promises of compensation made by the defendant firm to the plaintiff in respect of this consignment and that such promises were made without consideration. An agreement made without consideration becomes a contract if, but only if, in the words of section 26(b) of the Contracts (Malay States) Ordinance No. 14 of 1950:

"It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor."

Was the plaintiff a person who had already "voluntarily" done something for the defendant firm?

In *Kalipada Das and another* v. *Durgadas Roy*,[4] it was held that services rendered by the promisee in that case for the promisor had not been done voluntarily within the meaning of section 25(2) of the Indian Contract Act, which on this point is *in pari materia* with our section 26(b), because —

> " They were rendered on request, in pursuance of an agreement to pay a certain remuneration."

In *T. V. Krishna Iyer* v. *The Official Liquidator, The Cape Comorin General Traffic Co. Ltd.*[5], it was held that services rendered by workmen in return for the wages payable to them (and if they have only discharged their duties as requested by the agreement entered into by them with their employers) were not voluntary and no extra compensation promised to them will come within the meaning of the corresponding section of the Indian Contract Act. In *Raja of Venatagiri* v. *Krishnayya*,[6] the Privy Council held that money which had been advanced by the plaintiff to the defendant because of an undertaking given by the plaintiff's father to the defendant had not been advanced voluntarily.

In the instant case the plaintiff found for the defendant firm a company in Holland who was willing to sell confectionery to Lam Ann Thye & Co. It was admitted that this was done at the suggestion of the defendant firm. Had this been done also "in pursuance of an agreement to pay a certain remuneration", then following the decision in *Kalipada Das* v. *Durgadas Roy*[4] the plaintiff had done whatever he did for the defendant firm "voluntarily". But in this case the plaintiff had done what he did at the suggestion of the defendant firm without any agreement by the defendant firm to pay any remuneration. Was such act done "voluntarily"? I can find no case on this very point. The Contracts (Malay States) Ordinance itself does not define "voluntarily". According to note (d) on page 204 of the 8th edition of *Pollock & Mulla* on the Indian Contract Act, Whitley Stokes who had a hand in the drafting of the Indian Act was of the opinion that this word means "otherwise than at the desire of the promisor". The *Shorter Oxford Dictionary* defines voluntary acts as being acts "performed or done of one's own free will, impulse or choice; not constrained, prompted or suggested by another."

In view of this, giving the word "voluntarily" its ordinary every day meaning, I am of the opinion that the act done by the plaintiff for the defendant firm at the latter's suggestion had not been done voluntarily and therefore the promise made without consideration by the defendant firm to compensate the plaintiff is not a contract.

As regards the second transaction, namely, the sale to Sin Lian Hin & Co. of the steel bars, in a letter dated 18th July, 1958, at page 34 of exhibit A, the defendant, writing the plaintiff's solicitors relating to this transaction, referred to the plaintiff company as his principal. In a letter dated 28th July, 1958, at page 35, again, the defendant, this time writing to the Chartered Bank, referred to the plaintiff as his principal, but in none of the letters included in Exhibit A relating to the second transaction did the defendant refer to himself as a *del credere* agent of the plaintiff nor did he make any promise to compensate the plaintiff in any way in respect of the price of the steel bars. Consequently as to this transaction also I find against the plaintiff.

Accordingly the plaintiff's claims are dismissed with costs.

Claims dismissed.

Solicitors: *Donaldson & Burkinshaw.*

Re CHAN SEK KEONG

[O.C.J. (Ong J.) January 31, 1962]

[K.L. — Petition for Admission No. 33 of 1961]

Advocate and Solicitor — Admission — LL.B. (Malaya) — Attendance at post-graduate course organised by the University — Reading in Chambers — Notice — Shortening of — Special grounds — Interpretation of section 5(5) of the Advocates and Solicitors Ordinance, 1947, as amended by Advocates and Solicitors (Amendment) Act, 1961 — Position of law graduates of University of Malaya.

The petitioner passed the final examination for the degree of Bachelor of Laws of the University of Malaya on January 6, 1961. He attended and completed a post-graduate course of instruction in law organised by the University from February to April 1961. Since May 1, 1961 he had attended at the office of Messrs. Bannon and Bailey, Kuala Lumpur, and received instruction under Mr. Edgar, a practitioner of more than 7 years standing in the Bar of the Federation. On June 10, 1961 the petitioner was conferred the degree of Bachelor of Laws. On September 21, 1961 the Advocates and Solicitors (Amendment) Act No. 35 of 1961 came into force by which "a person upon whom the University of Malaya has conferred the degree of Bachelor of Laws of the University" became a qualified person under section 2 of the said Ordinance. On September 26, the petitioner filed his petition for admission and enrolment together with the notice under section 5(2) of the said Ordinance and the date of last posting of such notice was September 28, 1961. He appeared before the Board of Examiners on November 11, 1961 as required by section 7(1)(a). The petitioner now applied to shorten the period of notice under section 5(4) of the said Ordinance stating as his special ground that but for the delay in passing the Advocates and Solicitors (Amendment) Act No. 35 of 1961, he should have been able to file his petition immediately after receiving the degree of Bachelor of Laws of the University of Malaya on June 10, 1961 in which case he would have been entitled to have his petition heard by the middle of December 1961 without having to invoke the provisions of section 5(5). His petition was opposed by the Bar Council.

Held: (1) the words "special grounds" in section 5(5) of the Advocates and Solicitors Ordinance, 1947, do not import a plurality of special grounds. In any event, following the amendments introduced by the Advocates and Solicitors (Amendment) Act, 1961, there was now